Supreme Court of the United States

OCTOBER TERM, 1902.

No. 121.

HOME LIFE INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

A. A. FISHER, EXECUTOR, DEFENDANT IN ERROR.

Brief of Plaintiff in Error in Reply to the Contentions of the Defendant in Error.

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1. That the case was tried on pleas which presented substantially the same issues as were presented by the pleas stricken out upon demurrer.

2. That though there was error in sustaining demurrers to the pleas, yet it was without injury, because the court charged the jury as if the pleas were in the record, and therefore defendant obtained the same advantage as if the pleas had not been eliminated.

3. That the defendant deliberately withdrew pleas which presented substantially the same issues as the pleas stricken upon demurrer.

I.

This ground is not tenable as to the pleas in warranty.

These were the first plea (pages 17 and 18, Record), the third plea (page 18, Record), and the twenty-third plea (pages 36 and 37, Record), the sustaining of demurrers to which is assigned as error in assignments numbered 1, 2, and 3.

These were all pleas of breach of warranty, under which the defendant had no burden except proof of the literal falsity of the thing warranted.

The pleas upon which the case was tried were plea 17 (pages 25 and 26), plea 21 (page 33), and plea 26 (page 41). These were pleas of representation and alleged and required the defendant to prove not only the substantial falsity of the representation, but also the materiality of it, and that it induced the insurer to issue the policy.

Of course the plaintiff in error was injured by being compelled to assume burdens of proof which it would not have borne if its pleas of warranty had been sustained.

Nor is the ground true as to the pleas of representation.

These were pleas 4 (page 18), 6 (page 19), 7 (page 19), 8 (page 20), and 9 (page 20), the sustaining of demurrers to which is assigned as error in assignments 4, 5, 6, 7, and 8. They were pleas of misrepresentation, under which the defendant had to prove only that the representations were substantially false, and that they were material.

Pleas 17, 21, and 26, under which the case was tried, superadded to these the further allegation and required the further proof that the insurer was induced by the representation to issue the policy.

The court in sustaining demurrers to the pleas not con-

taining this latter allegation required the plaintiff in error to allege it, and thus to assume an additional burden of proof. This, of course, was injury.

Besides, pleas 1, 4, 7, 8, and 9, which were overruled, relied upon the falsity of the statement in the application that the assured only drank liquors *moderately*, while pleas 17, 21, and 26, upon which the trial was had, relied upon the untruth of other and distinct statements of the assured in the application and declaration to the medical examiners.

II.

This ground is not tenable.

We do not admit that in cases at law the court can, after having upon demurrer to pleas pronounced a certain defense bad at the trial, give a charge upon the assumption that such defense is in the record and is good, and thus cure the error. Such a contention ignores the necessary fact that attorneys prepare their cases upon the pleadings as settled by the court, and have no right to anticipate a change of front at the trial. Relying upon the status thus fixed and upon the manifest error committed by the court, the attorney for the defense in this case might well have prepared no evidence or less evidence under the pleas which were in at the trial than he would have done if his principal defense had not been taken away from him upon demurrer, and it cannot be permitted that a surprise and entrapping of this kind can be "a cure of error." In this connection the court will note that the evidence is not in the bill of exceptions, and therefore the court cannot tell whether the defendant developed its full case or whether it was induced by the action of the

court on the demurrers to forego a full development, and yet this court must find affirmatively in the record that the defendant was not so induced and was injured, for—

"It is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Vicksburg & Meridian Railroad Company *vs.* O'Brien, 119th U. S., page 103.

The court will also observe that the whole charge is not in the record, but only disjointed portions of it, and the court cannot, therefore, say how the portions relied upon to cure the error were themselves modified or controlled by other portions omitted from the record.

But it appears affirmatively that the error was not cured by the portion of the charge relied on, because it itself was inconsistent with and its effect nullified by other portions of the charge contained in the record.

The charge relied upon as giving the same advantage to plaintiff in error as if its plea of warranty had not been sustained is as follows:

"If you find either one to be true—that before McLean made application he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquors, you will find in this case for defendant." (Top of page 1, brief of defendant in error.) (I do not advert to the charges relied upon for the same purpose by defendant in error, and following on the same page, as they obviously relate only to the *quantum* of proof as to the habit of assured and do not purport to say that the mere finding of a habit would necessitate a verdict for defendant.)

The instruction quoted was unquestionably such an instruction as should have been given if a plea of warranty had been in the record; but

It was explicitly nullified by other instructions, and

It was inconsistent with almost all other portions of the charge.

It was nullified by the first charge requested by the defendant in error (ninth exception, page 58, Record), in which the court stated to the jury all the papers constituting and connected with the contract and concluded:

"The court instructs you in reference to those documents that there was no warranty made by McLean to the insurance company as to whether McLean drank wine, spirits or malt liquors, or to what extent he drank them."

It was nullified by the 13th, 14th, 15th, and 18th charges requested by defendant in error and given by the court (11th, 12th, 13th, and 14th exceptions, pages 59 and 60, Record), in which the court left it to the jury to say whether the insurer had not waived the truth of the answers made by the assured, and thus left it to the jury to say whether there was or was not a warranty.

It was inconsistent with and therefore nullified by almost every other instruction given by the court; for example, the 18th (page 48, Record), the 10th (page 52), the 12th, 13th, 14th, and 15th (page 55), the 20th (page 56), etc., etc., all of which are founded upon pleas found in the record, and in all of which the court substantially instructed the jury that for the insurer to establish its defense it was necessary to show not only the falsity of the statements of the assured, but also their materiality, and that they induced the issuance of the policy.

Of course, the submission of these issues to the jury was incompatible with any subsisting defense of warranty, and the jury could only understand that they could not find for the defendant unless they found that any representations made were material to the risk and constituted the inducement to issue the policy.

Not only, therefore, does the defendant in error fail to show that the error of the court in sustaining the demurrers to the pleas was cured by the charge quoted by them, but a consideration of these very charges show that they were inconsistent with themselves, and so misleading as to confuse the jury and prevent their arriving at an intelligent verdict. This furnished in itself a substantive ground for reversal.

Bank of Metropolis *vs.* Bank of New England, 6th Howard, 212.

III.

Nor is this ground tenable.

While the plaintiff in error did withdraw pleas 16 (page 22), 18, 19, and 20 (pages 26 and 27), as stated by counsel for defendant in error (Brief, pages 12, 13, and 14), and while each of these pleas contained some of the averments contained in the pleas pronounced bad on demurrer, yet none of them were equivalent to any of those, for each of them contained additional averments, and thus would have required additional proof.

Thus 16, 18, and 20 contained an allegation that "McLean knew of the habit and believed the same to be material." The 16th alleged that "he fraudulently withheld

knowledge" from the defendant, and the 19th, 20th, and 22d alleged that the defendant was induced to issue the policy by the representations of McLean, and that such representations were material in three specified ways. It cannot be contended, even plausibly, that because the plaintiff in error refused to put upon itself these additional burdens of proof, which the court erroneously required it to assume, it is estopped from insisting that the pleas contained therein were good.

Respectfully submitted.

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